R. v. Van der Peet [1996] 2 S.C.R. 507: Aboriginal rights -- Right to sell fish on non-commercial basis -- Fish caught under native food fish licence – Regulations prohibiting sale or barter of fish caught under that licence -- Fish sold to non-aboriginal and charges laid -- Definition of "existing aboriginal rights"

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law -- Aboriginal rights -- Right to sell fish on non-commercial basis -- Fish caught under native food fish licence – Regulations prohibiting sale or barter of fish caught under that licence -- Fish sold to non-aboriginal and charges laid -- Definition of "existing aboriginal rights" as used in s. 35 of Constitution Act, 1982 -- Whether an aboriginal right being exercised in the circumstances -- Constitution Act, 1982, s. 35(1) – Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1) -- British Columbia Fishery (General) Regulations, SOR/84-248, s. 27(5).

The appellant, a native, was charged with selling 10 salmon caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the British Columbia Fishery (General) Regulations, which prohibited the sale or barter of fish caught under such a licence. The restrictions imposed by s. 27(5) were alleged to infringe the appellant's aboriginal right to sell fish and accordingly were invalid because they violated s. 35(1) of the Constitution Act, 1982. The trial judge held that the aboriginal right to fish for food and ceremonial purposes did not include the right to sell such fish and found the appellant guilty. The summary appeal judge found an aboriginal right to sell fish and remanded for a new trial. The Court of Appeal allowed the Crown's appeal and restored the guilty verdict. The constitutional question before this Court queried whether s. 27(5) of the Regulations was of no force or effect in the circumstances by reason of the aboriginal rights within the meaning of s. 35 of the Constitution Act, 1982.

Held (L'Heureux-Dubé and McLachlin JJ. dissenting): The appeal should be dismissed.

The Aboriginal Right

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: A purposive analysis of s. 35(1) must take place in light of the general principles applicable to the legal relationship between the Crown and aboriginal peoples. This relationship is a fiduciary one and a generous and liberal interpretation should accordingly be given in favour of aboriginal peoples. Any ambiguity as to the scope and definition of s. 35(1) must be resolved in favour of aboriginal peoples. This purposive analysis is not to be limited to an analysis of why a pre-existing doctrine was elevated to constitutional status.

Aboriginal rights existed and were recognized under the common law. They were not created by s. 35(1) but subsequent to s. 35(1) they cannot be extinguished. They can, however, be regulated or infringed consistent with the justificatory test laid out in R. v. Sparrow.

Section 35(1) provides the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, customs and traditions, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights

which fall within the provision must be defined in light of this purpose. The French version of the text, prior jurisprudence of this Court and the courts of Australia and the United States, academic commentators and legal literature support this approach.

To be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. A number of factors must be considered in applying the "integral to a distinctive culture" test. The court must take into account the perspective of the aboriginal peoples, but that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.

In assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right. To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. The activities must be considered at a general rather than specific level. They may be an exercise in modern form of a pre-contact practice, custom or tradition and the claim should be characterized accordingly.

To be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question -- one of the things which made the culture of the society distinctive. A court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive) or at those aspects of the aboriginal society that are only incidental or occasional to that society. It is those distinctive features that need to be acknowledged and reconciled with the sovereignty of the Crown.

The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact with European society. Conclusive evidence from pre-contact times about the practices, customs and traditions of the community in question need not be produced. The evidence simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. The concept of continuity is the means by which a "frozen rights" approach to s. 35(1) will be avoided. It does not require an unbroken chain between current practices, customs and traditions and those existing prior to contact. A practice existing prior to contact can be resumed after an interruption.

Basing the identification of aboriginal rights in the period prior to contact is not inconsistent with the inclusion of the Métis in the definition of "aboriginal peoples of Canada" in s. 35(2) of the Constitution Act, 1982. The history of the Métis and the reasons underlying their inclusion in the protection given by s. 35 are quite distinct from those relating to other aboriginal peoples in Canada. The manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined.

A court should approach the rules of evidence, and interpret the evidence that exists, conscious of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions and customs engaged in. The courts must not undervalue the evidence

presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards applied in other contexts.

Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right. Claims to aboriginal rights are not to be determined on a general basis.

In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

A practice, custom or tradition, to be recognized as an aboriginal right need not be distinct, meaning "unique", to the aboriginal culture in question. The aboriginal claimants must simply demonstrate that the custom or tradition is a defining characteristic of their culture.

The fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. A practice, custom or tradition will not meet the standard for recognition of an aboriginal right, however, where it arose solely as a response to European influences.

The relationship between aboriginal rights and aboriginal title (a sub-category of aboriginal rights dealing solely with land claims) must not confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look both at the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

The first step in the application of the integral to a distinctive culture test requires the Court to identify the precise nature of the appellant's claim to have been exercising an aboriginal right. Here, the appellant claimed that the practices, customs and traditions of the Sto:lo include as an integral element the exchange of fish for money or other goods. The significance of the practice, tradition or custom is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right. The claim must be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods.

The trial judge made no clear and palpable error which would justify an appellate court's substituting its findings of fact. These findings included: (1) prior to contact exchanges of fish were only "incidental" to fishing for food purposes; (2) there was no regularized trading system amongst the appellant's people prior to contact; (3) the trade that developed with the Hudson's Bay Company, while of significance to the Sto:lo of the time, was qualitatively

different from what was typical of Sto:lo culture prior to contact; and, (4) the Sto:lo's exploitation of the fishery was not specialized and that suggested that the exchange of fish was not a central part of Sto:lo culture. The appellant failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo culture which existed prior to contact and was therefore protected by s. 35(1) of the Constitution Act, 1982.

Per L'Heureux-Dubé J. (dissenting): Aboriginal rights find their origin in the historic occupation and use of native ancestral lands. These rights relate not only to aboriginal title but also to the component elements of this larger right, such as aboriginal rights to hunt, fish or trap, and their accompanying practices, customs and traditions. They also include other matters, not related to land, that form part of a distinctive aboriginal culture.

Aboriginal rights can exist on reserve lands, aboriginal title lands, and aboriginal right lands. Reserve lands are reserved by the federal government for the exclusive use of Indian people. Title to aboriginal title lands -- lands which the natives possess for occupation and use at their own discretion -- is founded on common law and is subject to the Crown's ultimate title. It exists when the bundle of aboriginal rights is large enough to command the recognition of a sui generis proprietary interest to occupy and use the land. Aboriginal title can also be founded on treaties. Finally, aboriginal right lands are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes) because the occupation and use by the particular group of aboriginal people is too limited and, as a result, does not meet the criteria for the recognition, at common law, of aboriginal title. These types of lands are not static or mutually exclusive.

Prior to 1982, aboriginal rights were founded only on the common law and they could be extinguished by treaty, conquest and legislation as they were "dependent upon the good will of the Sovereign". Now, s. 35(1) of the Constitution Act, 1982 protects aboriginal interests arising out of the native historic occupation and use of ancestral lands through the recognition and affirmation of "existing aboriginal and treaty rights of the aboriginal peoples of Canada".

The Sparrow test deals with constitutional claims of infringement of aboriginal rights. This test involves three steps: (1) the assessment and definition of an existing aboriginal right (including extinguishment); (2) the establishment of a prima facie infringement of such right; and, (3) the justification of the infringement.

Section 35(1) must be given a generous, large and liberal interpretation and ambiguities or doubts should be resolved in favour of the natives. Aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown vis-à-vis aboriginal people. Most importantly, aboriginal rights protected under s. 35(1) must be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives. It is not appropriate that the perspective of the common law be given an equal weight with the perspective of the natives.

The issue of the nature and extent of aboriginal rights protected under s. 35(1) is fundamentally about characterization. Two approaches have emerged.

The first approach focuses on the particular aboriginal practice, custom or tradition. It considers that what is common to both aboriginal and non-aboriginal cultures is non-aboriginal and hence not protected by s. 35(1). This approach should not be adopted. This approach misconstrues the words "distinctive culture", used in Sparrow, by interpreting it as if

it meant "distinct culture". It is also overly majoritarian. Finally, this approach is unduly restrictive as it defines aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away.

The second approach describes aboriginal rights in a fairly high level of abstraction and is more generic. Its underlying premise is that the notion of "integral part of [aboriginals'] distinctive culture" constitutes a general statement regarding the purpose of s. 35(1). Section 35(1) should be viewed as protecting, not a catalogue of individualized practices, customs or traditions but the "distinctive culture" of which aboriginal activities are manifestations. The emphasis is on the significance of these activities to natives rather than on the activities themselves. These aboriginal activities should be distinguished from the practices or habits which were merely incidental to the lives of a particular group of aboriginal people and, as such, would not warrant protection under s. 35(1).

The criterion of "distinctive aboriginal culture" should not be limited to those activities that only aboriginal people have undertaken or that non-aboriginal people have not. Rather, all practices, customs and traditions which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1). A generous, large and liberal construction should be given to these activities in order to give full effect to the constitutional recognition of the distinctiveness of aboriginal culture. What constitutes a practice, custom or tradition distinctive to native culture and society must be examined through the eyes of aboriginal people.

The question of the period of time relevant to the recognition of aboriginal rights relates to whether the practice, custom or tradition has to exist prior to a specific date, and also to the length of time necessary for an aboriginal activity to be recognized as a right under s. 35(1). Two basic approaches exist: the "frozen right" approach and the "dynamic right" approach. The latter should be preferred.

The "frozen right" approach would recognize practices, customs and traditions that existed from time immemorial and that continued to exist at the time of British sovereignty. This approach overstates the impact of European influence on aboriginal communities, crystallizes aboriginal practice as of an arbitrary date, and imposes a heavy burden on the persons claiming an aboriginal right even if evidentiary standards are relaxed. In addition, it embodies inappropriate and unprovable assumptions about aboriginal culture and society and is inconsistent with Sparrow which refused to define existing aboriginal rights so as to incorporate the manner in which they were regulated in 1982.

Underlying the "dynamic right" approach is the premise that "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. Aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, customs and traditions change and evolve with the overall society in which they live. This generous, large and liberal interpretation of aboriginal rights protected under s. 35(1) would ensure their continued vitality. Practices, customs and traditions need not have existed prior to British sovereignty or European contact. British sovereignty, instead of being considered the turning point in aboriginal culture, would be regarded as having recognized and affirmed practices, customs and traditions which are sufficiently significant and fundamental to the culture and social organization of aboriginal people. This idea relates to the "doctrine of continuity".

The aboriginal activity must have formed an integral part of a distinctive aboriginal culture for a substantial continuous period of time. This period should be assessed based on: (1) the type of aboriginal practices, customs and traditions; (2) the particular aboriginal culture and society; and, (3) the reference period of 20 to 50 years. This approach gives proper consideration to the perspective of aboriginal people on the meaning of their existing rights.

As regards the delineation of the aboriginal right claimed, the purposes of aboriginal practices, customs and traditions are highly relevant in assessing if they are sufficiently significant to the culture for a substantial continuing period of time. The purposes should not be strictly compartmentalized but rather should be viewed on a spectrum, with aboriginal activities undertaken solely for food at one extreme, those directed to obtaining purely commercial profit at the other extreme, and activities relating to livelihood, support and sustenance at the centre.

An aboriginal activity does not need to be undertaken for livelihood, support and sustenance purposes to benefit from s. 35(1) protection. Whether an activity is sufficiently significant and fundamental to the culture and social organization for a substantial continuing period of time will have to be determined on the specific facts giving rise to each case, as proven by the Crown, in view of the particular aboriginal culture and the evidence supporting the recognition of such right.

Nevertheless, the facts did not support framing the issue in this case in terms of commercial fishing. Appellant did not argue that her people possessed an aboriginal right to fish for commercial purposes but only the right to sell, trade and barter fish for their livelihood, support and sustenance. Finally, the legislative provision under constitutional challenge was not only aimed at commercial fishing but also at the non-commercial sale, trade and barter of fish.

The trial judge and the Court of Appeal erred in framing the issue and in using a "frozen right" approach. The trial judge, since he asked himself the wrong questions and erred as to the proper evidentiary basis necessary to establish an aboriginal right under s. 35(1), made no finding of fact, or insufficient findings of fact, as regards the Sto:lo's distinctive aboriginal culture relating to the sale, trade and barter of fish for livelihood, support and sustenance purposes. An appellate court, given these palpable and overriding errors affecting the trial judge's assessment of the facts, is accordingly justified in intervening in the trial judge's findings of fact and substituting its own assessment of the evidence presented at trial.

The fishery always provided a focus for life and livelihood for the Sto:lo and they have always traded salmon for the sustenance and support of themselves and their families. These activities formed part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time -- for centuries before the arrival of Europeans -- and continued in modernized forms until the present day. The criteria regarding the characterization and the time requirement of aboriginal rights protected under s. 35(1) of the Constitution Act, 1982 were met.

Per McLachlin J. (dissenting): A court considering the question of whether a particular practice is the exercise of a s. 35(1) constitutional aboriginal right must adopt an approach which: (1) recognizes the dual purposes of s. 35(1) (to preclude extinguishment and to provide a firm foundation for settlement of aboriginal claims); (2) is liberal and generous toward aboriginal interests; (3) considers the aboriginal claim in the context of the historic way of life

of the people asserting it; and (4) above all, is true to the Crown's position as fiduciary for the first peoples. The legal perspectives of both the European and the aboriginal societies must be incorporated and the common law being applied must give full recognition to the pre-existing aboriginal tradition.

The sale at issue should not be labelled as something other than commerce. One person selling something to another is commerce. The critical question is not whether the sale of the fish is commerce or non-commerce, but whether the sale can be defended as the exercise of a more basic aboriginal right to continue the aboriginal people's historic use of the resource.

An aboriginal right must be distinguished from the exercise of an aboriginal right. Rights are generally cast in broad, general terms and remain constant over the centuries. The exercise of rights may take many forms and vary from place to place and from time to time. The principle that aboriginal rights must be ancestral rights is reconciled with this Court's insistence that aboriginal rights not be frozen by the determination of whether the modern practice at issue may be characterized as an exercise of the right. The rights are ancestral: their exercise takes modern forms.

History is important. A recently adopted practice would generally not qualify as being aboriginal. A practice, however, need not be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights do not find their source in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question, which existed prior to the imposition of European law and which often dated from time immemorial.

Continuity -- a link -- must be established between the historic practice and the right asserted. The exercise of a right can lapse, however, for a period of time. Aboriginal rights under s. 35(1) are not confined to rights formally recognized by treaty or the courts before 1982.

Neither the "integral part" nor the "dynamic rights" approach provides a satisfactory test for determining whether an aboriginal right exists, even though each captures important facets of aboriginal rights. The "integral-incidental" test is too broad, too indeterminative and too categorical.

Aboriginal rights should be defined through an empirical approach. Inferences as to the sort of things which may qualify as aboriginal rights under s. 35(1) should be drawn from history rather than attempting to describe a priori what an aboriginal right is.

The common law predicated dealings with aboriginals on two fundamental principles: (1) that the Crown asserted title subject to existing aboriginal interests in their traditional lands and adjacent waters, and (2) that those interests were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use the land and adjacent waters as the people had traditionally done for their sustenance is a fundamental aboriginal right which is supported by the common law and by the history of this country and which is enshrined in s. 35(1) of the Constitution Act, 1982.

The aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular aboriginal people have traditionally obtained therefrom. If the aboriginal people show that they traditionally sustained themselves from the river or sea, then they have a prima facie right to continue to do so, absent a treaty exchanging

that right for other consideration. The right is not the right to trade, but the right to continue to use the resource in the traditional way to provide for traditional needs, albeit in their modern form. If the people demonstrate that trade is the only way of using the resource to provide the modern equivalent of what they traditionally took, it follows that the people should be permitted to trade in the resource to the extent necessary to provide the replacement goods and amenities. In this context, trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised.

The right to trade the products of the land and adjacent waters for other goods is not unlimited. The right stands as a continuation of the aboriginal people's historical reliance on the resource. There is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what they traditionally obtained from the resource -- basic housing, transportation, clothing and amenities -- over and above what was required for food and ceremonial purposes. Beyond this, aboriginal fishers have no priority over non-aboriginal commercial or sport fishers.

All aboriginal rights to the land or adjacent waters are subject to limitation on the ground of conservation. Any right, aboriginal or other, also carries with it the obligation to use it responsibly. The Crown must establish a regulatory regime which respects these objectives.

The evidence conclusively established that over many centuries the fishery was used not only for food and ceremonial purposes but also for a variety of other needs. The scale of fishing here fell well within the limit of the traditional fishery.

Extinguishment

Per L'Heureux-Dubé J. (dissenting): The question of the extinguishment of the right found to exist must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain." No government of the day considered either the aboriginal right or the effect of its proposed action on that right, as required by the "clear and plain" test, in effecting any regulations which allegedly had the effect of extinguishing the aboriginal right to fish commercially.

Prima Facie Infringement

Per L'Heureux-Dubé J. (dissenting): The question of prima facie infringement must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): The inquiry into infringement involves two stages: (1) the person charged must show that he or she had a prima facie right to his or her actions, and (2) the Crown must then show that the regulatory scheme satisfied the particular aboriginal entitlement to fish for sustenance. The second requirement was not met.

Justification

Per L'Heureux-Dubé J. (dissenting): The question of justification must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): A large view of justification which cuts back the aboriginal right on the ground that this is required for reconciliation and social harmony should not be adopted. It runs counter to the authorities, is indeterminate and ultimately more political than legal. A more limited view of justification, that the Crown may prohibit exploitation of the resource that is incompatible with its continued and responsible use, should be adopted.

A government limitation on an aboriginal right may be justified, provided the limitation is directed to ensuring the conservation and responsible exercise of the right. Limits beyond this cannot be saved on the ground that they are required for societal peace or reconciliation. Limits that have the effect of transferring the resource from aboriginal people without treaty or consent cannot be justified.

Subject to the limitations relating to conservation and prevention of harm to others, the aboriginal people have a priority to fish for food, ceremony and supplementary sustenance defined in terms of the basic needs that the fishery provided to the people in ancestral times. Non-aboriginal peoples may use the resource subject to these conditions.

The regulation at issue was not justified.